July 25, 2003

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant:	State of Nevada
Date of Filing:	June 27, 2003
Case Number:	TFA-0035

On June 27, 2003, the State of Nevada (the Appellant) filed an Appeal from a final determination issued on May 29, 2003, by the Department of Energy's (DOE) Office of Repository Development (ORD). In that determination, ORD responded to a Request for Information filed on April 28, 2003, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. ORD's determination withheld portions of a responsive document requested by the Appellant. This Appeal, if granted, would require ORD to release additional information to the Appellant.

I. BACKGROUND

On April 28, 2003, the Appellant filed a request for information with ORD seeking "all documents relevant to aircraft crash assessments, analyses, etc., which would impact the proposed Yucca Mountain repository." On May 29, 2003, ORD issued a determination letter (the Determination Letter) releasing three responsive documents in their entirety. Determination Letter at 1. The ORD also released portions of a fourth responsive document, a 101 page document entitled "Consequence Analysis of Aircraft Crash into Transportation Cask" (the Report). However, the ORD withheld 78 pages of the Report under FOIA Exemptions 2, 4 and 5. Determination Letter at 1-2. On June 27, 2003, the Appellant submitted the present Appeal, which challenges ORD's withholding

determinations with regard to the Report. The Appeal challenges only those withholdings made under Exemption 2.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

A. Adequacy of Determination

Once the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

In the present case, neither the redacted version of the Report that was released to the Appellant nor the Determination Letter shows which particular information was withheld under each exemption. Accordingly, neither the Appellant nor this appeal authority can discern whether the exemptions used to withhold information were appropriately applied.

B. Exemption 2

The Appeal claims that ORD's withholdings under Exemption 2 were in error. In support of this assertion, the Appeal cites the text of Exemption 2, which exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). Specifically, the Appeal contends that the Report cannot be withheld under Exemption 2 because the Report has nothing to do with the agency's personnel policies and practices. Appeal at 2. However, the courts have broadly interpreted this exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature

("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this particular test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that: (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

The Report is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. United States Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*). The Report at issue here is an analysis of the potential hazards posed by aircraft to casks designed to transport high level nuclear waste and does not set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public .

The Report meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. Environmental Protection Agency*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general legal requirements. *NTEU*, 802 F.2d at 530-31. The Report is an assessment of the potential threats posed by aircraft to a proposed high level nuclear waste facility. Disclosure of the report has the potential to educate terrorists (and other individuals or entities seeking to harm the national security) about vulnerabilities. Therefore, releasing the report could allow terrorists to circumvent DOE's efforts to comply with its mandate to provide a secure and safe repository for high level nuclear waste. It is well settled that information that would disclose potential security vulnerabilities can be withheld under Exemption 2. *See, e.g., Schwartz v. United States Department of Treasury*, 131 F. Supp. 2d 142, 150 (D.D.C. 2000) (finding Secret Service protective measures protected under Exemption 2); *Voinche v. Federal Bureau of Investigation*, 940 F. Supp. 323, 329 (D.D.C. 1996) (withholding information relating to the security of the U.S. Supreme Court building and the security procedures for Supreme Court Justices under Exemption 2); *Institute for Policy Studies v. Department of the Air Force*, 676 F. Supp. 3, 5 (D.D.C. 1987) (withholding classification guide under Exemption 2). Accordingly, we find that any information contained in the report that would educate individuals or other entities with interests adverse to the common defense and national security may be properly withheld under the "high two" prong of Exemption 2. As stated above, however, we cannot determine whether ORD properly relied on Exemption 2 in withholding information in this instance without knowing specifically which information was actually withheld under this exemption.

III. CONCLUSION

We are therefore remanding this portion of the Appeal to ORD. On remand, ORD must issue a new determination letter specifically describing the types of information it is withholding under each claimed exemption and specifically indicating that information which is being withheld under each exemption.

It Is Therefore Ordered That:

(1) The Appeal filed by the State of Nevada, Case No. TFA-0035, is hereby granted as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal is hereby remanded to the Office of Repository Development for further clarification in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 25, 2003